IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0083
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
JAMES MARCH,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20033421

Honorable Ted B. Borek, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Joseph T. Maziarz — Phoenix
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Scott A. Martin — Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant James March was convicted of aggravated assault and discharging a firearm at a nonresidential structure, both dangerous offenses and class

three felonies, and unlawful discharge of a firearm within city limits, a dangerous offense and class six felony. On appeal, he argues the trial court committed fundamental error by giving misleading and improper instructions to the jury. We affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the verdicts and resolve all reasonable inferences against March. *See State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). In October 2003, March and his wife Deonna were entering a grocery store when they noticed a man in the parking lot, later identified as Todd Grimscheid, acting "very nervously . . . and kind of peeking through the windows of [a] Camaro." They agreed that Grimscheid appeared to be plotting some "kind of mischief" but decided to continue their shopping.

¶3 When they left the store twenty minutes later, "the car alarm on the Camaro was going off," and March saw Grimscheid was inside attempting to pry the stereo from the dashboard with a screwdriver. He yelled for Grimscheid to get out of the car. Grimscheid finished removing the stereo, got into a vehicle parked nearby, and began driving away. March then drew a 9-millimeter handgun and fired three shots, two of which struck Grimscheid's vehicle but did not stop its progress.

¶4 At trial, March testified that Grimscheid had driven directly at him and Deonna while fleeing the parking lot with the stolen stereo and he had believed Grimscheid was "going to run over [him] or [his] wife." March claimed he had fired his weapon to protect

himself and Deonna and to prevent Grimscheid from escaping. The trial court instructed the jury on justification based on self-defense, defense of a third person, and crime prevention. March was convicted as stated above and sentenced to concurrent, partially mitigated prison terms, the longest of which was six years. This appeal followed.

Jury Instructions

¶5 On appeal, March claims, for several reasons, the court's instructions were misleading and improper. At the outset, he concedes he did not object to the instructions below and has therefore waived all but fundamental error review, but he argues the instructions taken in their entirety constitute such error. Fundamental error is that "'going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006), *quoting State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). For the reasons expressed below, we find that any error in the court's instructions did not rise to the level of fundamental error and affirm March's convictions and sentences.

Burden of Proof

¶6 March first claims the trial court erred by "only instructing the jury on the burden and standard of proof as to self-defense and not as to the other two justification defenses." The record confirms that, after instructing the jury on justification based on self-

defense, defense of a third person, and crime prevention, the court did not specify the burden of proof required for each defense, but stated:

> Now, the defendant must prove the defense of self-defense by a preponderance of the evidence.
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> "Preponderance" means that the defense of self-defense is probably more true than not true. In determining whether the defendant has met this burden, consider all of the evidence whether produced by State or the defendant.

¶7 March argues "[t]his singular instruction imparted the impression that the justification defense of self-defense was unique and that the preponderance-of-the-evidence standard of proof applied to it and it only." He maintains the jurors could have assumed "he was obligated to prove [the other bases for justification] beyond a reasonable doubt." The state responds that, "[r]eading the justification instructions 'as a whole,' it is clear that, after instructing the jury on the three justification defenses, the trial court used the term 'self-defense' as a generic reference to all three justification defenses."

¶8 Jury instructions must be viewed in their entirety when determining whether they adequately reflect the law. *State v. Haas*, 138 Ariz. 413, 425, 675 P.2d 673, 685 (1983). We consider the instructions in context and in conjunction with the closing arguments of counsel. *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003). When an error has been made in instructions, we consider whether the error was harmless, that is, whether we can conclude beyond a reasonable doubt that it did not influence the verdict. *State v. McKeon*, 201 Ariz. 571, ¶ 9, 38 P.3d 1236, 1238 (App. 2002). If the instructions "are

'substantially free from error,' the defendant suffers no prejudice by their wording." *State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017, 1030 (1989), *quoting State v. Norgard*, 103 Ariz. 381, 383, 442 P.2d 544, 546 (1968). "'"It is only when the instructions taken as a whole are such that it is reasonable to suppose the jury would be misled thereby that a case should be reversed for error therein."'" *State v. Schrock*, 149 Ariz. 433, 440, 719 P.2d 1049, 1056 (1986), *quoting State v. McNair*, 141 Ariz. 475, 481, 687 P.2d 1230, 1236 (1984), *quoting Macias v. State*, 36 Ariz. 140, 153, 283 P. 711, 716 (1929).

¶9 We find that, although the court erred in failing to instruct the jury on the burden of proof for each justification defense, the error was harmless because the jurors were not misled, at least to March's detriment, by the court's instruction.[1] Throughout the trial, self-defense, defense of a third person, and crime prevention were conflated and discussed concomitantly as justifications for March's actions. The closing arguments of both counsel discussed these defenses together. The court gave consecutive instructions to the jury on each defense. The burden of proof instruction on self-defense immediately followed these instructions, a burden that would have been correct for the other justification defenses. Additionally, defense counsel emphasized during his closing argument that the preponderance of the evidence burden applied to all three bases for justification, stating:

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[1]We note that immediately following the burden of proof instruction for self-defense, the court instructed on the state's burden to prove beyond a reasonable doubt all elements of the charged offenses. Thus, any confusion the jury might have had about which party bore what burden of proof for the justification defenses would not have disadvantaged March, as discussed *infra*.

"We have established, I think, far beyond preponderance of the evidence that Mr. March had a right to pull that weapon."

¶10 In support of his argument, March relies on *State v. Denny*, 119 Ariz. 131, 579 P.2d 1101 (1978).[2] There, the defendant presented evidence that she had killed her husband in self-defense, *id.* at 132-33, 579 P.2d at 1102-03, and requested the jury be instructed that she had to merely raise a reasonable doubt that her actions were justified. *Id.* at 133-34, 579 P.2d at 1103-04. The trial court refused her request. *Id.* at 134, 579 P.2d at 1104. Our supreme court reversed, holding it was "error for the trial court to fail to give an instruction which informed the jury as to the burden of proof on the self-defense issue" and that "an instruction should have been given to make it clear to the jury that the defendant did not have to prove she acted in self-defense." *Id.* at 133-34, 579 P.2d at 1103-04. Here, however, unlike in *Denny*, March was not prejudiced by the court's failure to provide a burden of proof instruction because, under the former version of A.R.S. § 13-205, he in fact *did* have to prove his actions were justified. *Compare id.* (defendant "merely had to raise a reasonable doubt

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[2]March also cites *State v. Slemmer*, 170 Ariz. 174, 823 P.2d 41 (1991); *State v. Tittle*, 147 Ariz. 339, 710 P.2d 449 (1985); and *State v. Hunter*, 142 Ariz. 88, 688 P.2d 980 (1984), for the proposition that a trial court fundamentally errs when its "instructions on the burden or standard of proof do not clearly state the relevant law such that the jury clearly and unequivocally understands which party bears what burden." But these cases do not help him because, in each one, as in *Denny*, the defendant had been prejudiced by the trial court's failure to instruct that he was *not* required to prove he had acted in self-defense. *See Slemmer*, 170 Ariz. at 177-79, 823 P.2d at 44-46; *Tittle*, 147 Ariz. at 342, 710 P.2d at 452; *Hunter*, 142 Ariz. at 89-90, 688 P.2d at 981-82. And, in *State v. King*, 158 Ariz. 419, 421-24, 763 P.2d 239, 241-44 (1988), which March also cites, the trial court misstated the proper burden of proof. Here, the court did not misstate the proper burden of proof.

that she was justified in shooting her husband") *with* 1997 Ariz. Sess. Laws, ch. 136, § 4 ("a defendant shall prove any affirmative defense raised by a preponderance of the evidence, including any justification defense"). And we reject his claim the jurors could have concluded he was required to prove beyond a reasonable doubt justification based on defense of a third person and crime prevention: at no time during the trial did the court or either counsel suggest he was required to show anything beyond a reasonable doubt—only that he was required to prove by a preponderance of the evidence that he acted in self-defense. We conclude, therefore, that any error in the instructions did not constitute fundamental error.

Necessity of Acquittal

¶11 March next contends the court fundamentally erred by failing to specifically instruct the jury that it must acquit him if it found his actions justified. We again disagree and find the jurors were not misled. The court instructed the jury that a defendant is "justified" in using, and "may use," reasonable force in defense of self or a third person or to prevent a homicide or aggravated assault. It would have been self-evident to the jury that a defendant whose actions are justified and permissible under the law must be acquitted. Moreover, the prosecutor explained during closing argument "[t]here's nothing wrong with" the justified use of force; it is "fine," "proper[]," and "allowed . . . by the law." And defense counsel stated during his closing argument that March had a "right" to use justified force because it is "acceptable under the law and the circumstances," it means "legally he did nothing wrong," and the jury should therefore find him not guilty. Thus, we believe the jury

was adequately alerted that it was required to acquit March if it found his actions were justified.

Crime Prevention

¶12 March also claims the court's crime prevention instruction was prejudicial to him and misleading to the jury. The instruction stated:

> The defendant is justified in threatening or using physical force and/or deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent another from committing or apparently committing the crimes of first degree murder, second degree murder, manslaughter, or aggravated assault.
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> . . . .
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> The crime of first degree murder requires proof of the following three things: One, the defendant caused the death of another person; and, Two, the defendant intended or knew he would cause the death of another person; and, Three, the defendant acted with premeditation.

The court then instructed the jury on the elements of second-degree murder, manslaughter, and aggravated assault. March correctly observes the court's homicide instructions "erroneously used the word 'defendant' to describe the actor." Therefore, he claims, the instructions "(1) prevented the jury from understanding that it was Mr. Grimscheid's behavior that was at issue and (2) gave the jury the impression that Mr. March was the subject of additional serious felony accusations." The state responds that March cannot establish fundamental error because "it is clear from the instructions taken as a whole and

the arguments of counsel that the substantive offenses related to Grimscheid's conduct and not [March's]."[3]

¶13 Although it was technically erroneous for the court to use the term "defendant" to describe both March and the person March had allegedly defended himself and his wife from, the context in which the terms were used made it clear March had not been accused of attempting to commit a homicide. The trial court instructed the jury that March's actions were justified if he acted to prevent a homicide and then stated the elements of various homicide offenses. A logical reading of the instructions makes it clear the term "defendant" in the homicide instructions referred to Grimscheid, not to March. And the instructions repeated six times that March's actions were justified if had he acted to *prevent* a homicide. The jurors were also alerted that the term "defendant" in the homicide instructions referred to Grimscheid by defense counsel's closing argument, during which he argued that March had acted to prevent Grimscheid from killing him or Deonna.

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[3]Because we find the court's instructions did not constitute fundamental error, we need not address the state's alternative argument that March is unable to establish fundamental error because he was not entitled to an instruction on crime prevention. We note, however, that the case the state relies on, *State v. Buggs*, 167 Ariz. 333, 806 P.2d 1381 (App. 1990), is distinguishable from this case in at least one important way. In *Buggs*, the defendant challenged an instruction stating the defendant had the burden of proving self-defense beyond a reasonable doubt. *Id*. at 335, 806 P.2d at 1383. The court found that, because Buggs was not entitled to an instruction on self-defense, the error was harmless. *Id.* at 337, 806 P.2d at 1385. In contrast, March does not argue that the instruction misstated the burden of proof but that it prejudiced him by suggesting he had been accused of attempted homicide.

¶14 Moreover, assuming *arguendo* the jurors could have believed March had been accused of a homicide, it would not have affected their verdict. Although the prosecutor did state during closing argument that he believed March had been "willing" to kill Grimscheid, he did not argue or suggest that March had attempted to kill Grimscheid or should be found guilty of an attempted homicide. Rather, both the prosecution and defense focused on the charged offenses and the jury's verdict is supported by the evidence. *See State v. McKeon*, 201 Ariz. 571, ¶ 9, 38 P.3d 1236, 1238 (App. 2002) ("Error is harmless if we can conclude beyond a reasonable doubt that it did not influence the verdict.").

Senate Bill 1145

¶15 Lastly, March argues the jury should have been instructed, pursuant to the 2006 changes in A.R.S. § 13-205 effectuated by Senate Bill 1145, that the state was required to "prove beyond a reasonable doubt that [he] did not act with justification." § 13-205. Even were we inclined to agree, our supreme court recently held in *Garcia v. Browning*, ___ Ariz. ___, ¶ 20, 151 P.3d 533, 537 (2007), that

> the legislature did not expressly declare in Senate Bill 1145 that [the changes to § 13-205] applied to criminal offenses committed before [the bill's] effective date. The bill's changes to the criminal code's affirmative defense and justification defense provisions therefore apply only to offenses occurring on or after its effective date of April 24, 2006.

March committed his offense prior to April 24, 2006. Therefore, the statutory changes do not apply to his case, and we find no error with the court's instructions.

Disposition

¶16 March's convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

J. WILLIAM BRAMMER, JR., Judge